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Issue Date: 13 December 2005

**CASE NOS.: 2004-LHC-1898
 2004-LHC-1899
 2004-LHC-1900**

**OWCP NOS.: 07-159706
 07-152424
 07-150420**

IN THE MATTER OF

**JEANNE G. NEWTON-SASSER,
 Claimant**

v.

**NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
 Employer**

APPEARANCES:

**Tommy Dulin, Esq.
 On behalf of Claimant**

**Paul B. Howell, Esq.
 On behalf of Employer**

**BEFORE: C. RICHARD AVERY
 Administrative Law Judge**

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. Seq., (the Act), brought by Jeanne G. Newton-Sasser (Claimant) against Northrop Grumman Ship Systems, Inc. (Employer). The formal hearing was conducted in Gulfport, Mississippi on August 1, 2005. Each party was represented by counsel. The following exhibits were received into evidence: , Joint Exhibit 1, Claimant's Exhibits 1-20 and Employer's Exhibits 1-51. This decision is based on the entire record.¹

Statement of the Evidence

Claimant is fifty years old and has a high school education. She has a commercial driver's license and has worked as a nurse's aid, casino supervisor, insulator helper and secretary. She started with employer in March 1998 as a welder and became a ship fitter.

On May 17, 1998, a saw she was using bucked and cut her right hand. She received treatment, which Employer paid, from Drs. Ball and Richardson. She was first released to light duty and ultimately returned to her regular job. Her maximum medical date of improvement was July 12, 1999, and she conceded at the hearing that though she still has some numbness in two fingers, she received all the compensation for this injury to which she is entitled (Tr. 108).

On March 10, 1999, Claimant was back at work full-time with Employer when she slipped and fell down a flight of stairs striking her back, head and buttocks. She was seen at the shipyard's hospital and a possible fracture of her coccyx bone was revealed, but she was released to work.

Subsequently, Claimant saw Dr. Harold Hawkins who, after various studies, referred Claimant to Dr. Charles Winters who restricted Claimant to light duty with no frequent bending or stooping or lifting greater than 20 pounds, and he released her to work in September 2000. Claimant was also seen by Dr. Terry Millette for headaches, and then an independent medical exam was performed by Dr. James West. Claimant next went to an emergency room where she was seen by Dr. Charles McCloskey in consultation with Dr. Jeffery Lassiter. Her maximum

¹ The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript: "Tr. ____"; ALJ Exhibit: "ALJX, p. ____"; Joint Exhibit: "JX, p. ____"; and Employer's Exhibits "EX __, p. ____".

medical date of improvement as to that accident was September 12, 2000, and but for the comp rate paid Claimant is satisfied with the periods of compensation paid from that injury (Tr. 109).

On January 30, 2001, again while at work, Claimant testified her right leg gave way and she fell, knocking her glasses off and striking her head. She said she hurt her neck and bruised her knees and arms and caused her back to hurt worst.

Claimant returned to Dr. Lassiter who, after a short time, released her to work with Dr. Winters previous restrictions. Next Claimant placed herself under the care of Dr. William Fleet at the recommendation of her attorney. Dr. Fleet on May 8, 2001, released Claimant to work with no ladder climbing or sweeping or mopping. Claimant was terminated from her employment with Employer because they had no restricted positions to offer her. As to the date of maximum medical improvement following this event, the parties have agreed that that occurred on March 8, 2001, and Claimant is satisfied with the periods of compensation paid to her through May 8, 2001.

In addition to the physicians mentioned, Claimant has also seen Dr. Thomas Yearwood, Dr. Jay Epker and Dr. Lee Kesterson, and she has had an FCE.

Claimant testified that she takes an abundance of medication, cannot drive due to neck restrictions, is forgetful and that her eyes and teeth have been damaged also, but offered no evidence concerning those injuries. She sleeps two hours a night, and she testified her family does the household chores. As far as jobs, Claimant acknowledged that she had applied for only two identified by Mr. Sanders, Employer's vocational rehabilitation expert, but has "called" other places. Also, since leaving her employment with Employer, she has worked several jobs elsewhere.

From May 22, 2000 until December 14, 2004, Employer's vocational rehabilitation expert, Tommy Sanders, interviewed Claimant, reviewed her employment medical histories and has conducted several job surveys and identified over twenty job opportunities (EX 50).

Following Claimant's ultimate departure from Employer in 2001, Mr. Sanders, on June 5, 2001, conducted another in a series of labor market surveys using the then updated medical reports from Drs. Fleet and Lassiter, and he identified a dispatcher position at \$6.00 per hour, a motel desk clerk at \$6.00 per hour and a security guard position at \$5.25 per hour.

Subsequently, on September 14, 2004, Mr. Sanders conducted another job survey and identified a desk clerk position at \$5.50 per hour, an account representative at \$7.00 per hour, a cashier position at \$5.15 per hour, a dispatcher position at \$5.15 per hour, and a telephone solicitor at \$6.00 per hour. Again, on December 9, 2004, three other positions were identified with wages ranging from \$5.50 to \$6.50 per hour; and finally, on June 10, 2005, using the FCE results of April 21, 2005, three other positions were found: PBX operators at \$6.00 per hour, account representative at \$6.00 per hour and desk clerk at \$5.15 per hour.

Dr. Harold Hawkins (EX 37) first saw Claimant March 17, 1999, after her March 10, 1999, fall down stairs at work. She complained of numbness in the right leg and pain in her sacrum in low back. Complaints of numbness in her leg continued throughout other visits, but an MRI revealed no disk problem at the time. Epidural injections in April gave temporary relief, and her EMG studies were normal. Claimant was referred to Dr. Winters in May of 1999.

Dr. Charles Winters saw Claimant on June 8, 1999 (EX 38) with complaint of sacral pain and right leg pain and numbness. A milligram and CT scan of the lumbar spine detected no significant disk herniation or spinal stenosis.

Seeing nothing to do for Claimant, on July 6, 1999, Dr. Winters put Claimant on light duty with no lifting more than 20 pounds and no frequent bending or stooping and declared her to be at maximum medical improvement. The lifting restrictions, however, were reduced to 5 pounds on November 23, 1999, and then by January 27, 2000, were altered once more to 15 pounds. On that date Dr. Winters opined Claimant should continue seeing Dr. Millette for headaches and Dr. Lassiter, but noted she was not in need of orthopedic surgery. On August 22, 2000, Claimant continued to complain of worsening pain in her back and right leg and reported to Dr. Winters "several episodes of falling and fractured one of her toes...secondary to her leg giving out." Further studies were recommended, and an MRI of August 28, 2000, revealed degenerative disk disease and spondylosis.

By September of 2000, Claimant was, in addition to her prior complaints, complaining of neck, shoulder and upper back pain; but Dr. Winters again declared her maximum medical improvement. By March 8, 2001, Dr. Winters removed himself from the care of Claimant stating he could do no more, her restrictions were "appropriate" and she suffered only from degenerative disk disease (EX 38, pg. 24).

Starting July 9, 1999, Dr. Terry Millette saw Claimant for headaches (EX 39). He suspected cervical myofascial pain and lumbar pain and post milligram headaches. By September 9, 1999, Dr. Millette reported Claimant could work light duty, but not full capacity and restricted her from overhead work or welding. He continued medications.

On November 9, 1999, Dr. Millette more or less adopted Dr. Winter's limitation but noted "her cervical myofascial pain which is unrelated to her workers' comp injury keeps her from working overhead extensively." (EX 39, pg. 17). This opinion was reiterated by letter dated November 18, 1999 (EX 39, pg. 19); however, by March 28, 2000, Dr. Millette returned Claimant to work without restrictions. Botox injections were also tried for Claimant's cervical pain in November of 2001 and physical therapy was proposed on June 11, 2002. On December 8, 2003, Dr. Millette declared Claimant to be "medically disable" and unable to be gainfully employed, but then contradicted himself in letters of October 18, 2004, and June 7, 2005 (EX 39, pg. 32, 35).

Dr. James West performed an independent medical examination of Claimant on July 14, 1999 (EX 40). He opined Claimant had degenerative disk disease unrelated to her accident, that she was at maximum medical improvement and had no impairment related to her injury. He returned her to work without restrictions.

Dr. John McCloskey saw Claimant at the emergency room on July 19, 1999 (EX 41). His impressions were: post-myelogram headaches, low back syndrome and over weight. She was ultimately released from the hospital and referred to pain management.

Dr. Jeffery Lassiter first saw Claimant July 21, 1999 for pain management (EX 42). He provided home exercises with therapy and medication. Nerve blocks were administered on April 12, 2000, and on May 11, 2000, he adopted Dr. Winter's restrictions and agreed Claimant could work (EX 42, pg. 24).

On August 23, 2000, SI joint injections were administered and physical therapy was provided, but Claimant continued with her complaints of pain. On May 1, 2001, Dr. Lassiter again adopted Dr. Winters return to work guidelines (EX 43, pg. 55), and on March 30, 2001, he recommended an FCE which was performed April 20, 2001.

The physical capacity evaluation revealed Claimant to be qualified for full time employment but with no prolonged positions and lifting of no more than 20 pounds. Dr. Lassiter agreed and said he had nothing further to offer except medication supervision (EX 42, pg. 64). On July 30, 2002, he referred Claimant to Dr. Tom Yearwood.

At the referral of her attorney, Claimant also saw Dr. William Sheppard on April 6, 2001. Dr. Sheppard took Claimant off of work for a month and returned her to work on May 8, 2004, but restricted her from climbing ladders, sweeping or mopping (EX 43, pgs. 4, 10).

Dr. M. F. Longnecker saw Claimant on June 21, 2002 (EX 44). She complained of her right leg buckling from time to time causing her to fall. Dr. Longnecker felt Claimant could do sedentary work, he found some degenerative disk disease and ligamentous hypertrophy causing sciatic pain and thus causing her leg to buckle.

Dr. Thomas Yearwood was seen by Claimant at the referral of Dr. Lassiter (EX 45). Her visit was December 16, 2002. Dr. Yearwood concluded degenerative disk disease, headaches and SI joint dysfunction. He thought Claimant should continue with Dr. Millette and settle her case "as soon as possible." He subsequently provided nerve root blocks with steroid injections and repeated the procedure on several occasions. Eventually, Dr. Yearwood opined the pain pattern had improved as a result of the injections, but later he suggested an implanted stimulator. On June 6, 2005, Dr. Yearwood declared Claimant at maximum medial improvement and returned her to work with limitations (EX 45, pg. 45AA).

Jake Epker, PhD., is a psychologist who evaluated Claimant on February 5, 2004 (EX 46). After several visits, Claimant missed an appointment, and Dr. Epker opined at the time that she was at maximum medical improvement and apparently was not interested in pursuing her further intervention. However, Claimant did return for other visits and when last reported on November 4, 2004, was making progress with her coping techniques.

Dr. Lee Kesterson, a partner of Dr. McCloskey, saw Claimant August 31, 2004 (EX 47). He confirmed Claimant did have mechanical pain, but did not believe her to be a candidate for surgery.

FINDINGS AND CONCLUSIONS

In addition to the joint stipulations filed of record (JX 1), a thorough discussion was had at the conclusion of the formal trial in this matter. (Tr. 106-121).

May 17, 1998

As to this accident which occurred while in the course and scope of employment, the parties agreed that Claimant had reached maximum medical improvement on July 12, 1999, and had received for this injury (laceration of hand) all benefits to which she is entitled (Tr. p. 108). No evidence was offered that the injury combined with any other to worsen Claimant's subsequent disabilities.

March 10, 1999

As to this accident which also occurred while in the course and scope of employment and for which Claimant first reached maximum medical improvement on September 12, 2000, only two issues remain for my determination: 1) was the average weekly wage used by Employer in the payment of benefits correct and 2) is Employer liable for Dr. William Fleet's bill? Otherwise Claimant agrees that she is satisfied with what has been paid until she reached maximum medical improvement (Tr. 120).

As to average weekly wage, Employer urges that in the 52 weeks prior to this injury Claimant earned \$18,455.33 having worked 47 of those 52 weeks. That gross amount divided by 47 yields \$392.06 which Employer contends is the proper average weekly wage, insisting that 10(a) and (b) are not available for lack of evidence to support either formula. Claimant, on the other hand, submits in her brief that I should use her hourly rate times forty hours to determine her average weekly wage, thereby ignoring that there were five weeks in the preceding 52 week period she did not work. I disagree with Claimant's approach and adopt Employer's position that in the 52 weeks prior to this injury Claimant averaged \$392.06 per week.

As to Dr. Fleet's bill, I agree with Employer. Claimant was under the neurological care of Dr. Millette. She was referred to Dr. Fleet by her attorney without first requesting permission of Employer, and then subsequently saw Dr. Millette again (EX 34, pg. 21). Therefore, Claimant's failure to either obtain authorization from Employer in order to change physicians or her failure to show she was not being provided with proper care from her initial choice of physicians, relieves Employer from responsibility for Dr. Fleet's charges in this instance.

January 30, 2001

While at work on this date, Claimant's right leg gave way and she fell. Following this event it is agreed she again reached maximum medial improvement on March 8, 2001, but for the average weekly wage used by Employer, Claimant is satisfied with the periods of compensation paid through May 8, 2001. Claimant, however, maintains that the event of January 30, 2001 was a new accident and that her wage rate should be computed on her 2001 earnings, not her 1999 earnings (Tr. 111). Also, since leaving the employment of Employer, Claimant said she is and has been totally disabled, but Employer maintains Claimant is able to do light to sedentary work with an earning capacity of at least \$200.00 per week.

As to the issue regarding the nature of her last fall, I agree with Employer that it was not a new accident, but simply a consequence of the previous 1999 accident and the injury she suffered therefrom. Over 4 months earlier, on August 22, 2000, Claimant reported to Dr. Winters she had several episodes of falling which he said was secondary to her leg giving out. Dr. Longnecker subsequently agreed that her sciatic pain caused her right leg to buckle. There is no evidence I can find either from Claimant's own testimony or the medical opinions which suggest her fall of January 30, 2001 was a work related accident occurring on that date, it was simply a result of her previous injury. Consequently, as to the correct average wage to be applied to any additional compensation occasioned by the event, it would be the average weekly wage established for the March 10, 1999 accident.

Turning next to nature and extent of Claimant's injuries, no one contends Claimant can return to her shipyard work, so the burden is upon Employer to establish suitable alternative employment since Claimant's last MMI date of March 8, 2001, and I find Employer has done so.

Claimant has done a variety of jobs in her lifetime, is well spoken and capable of competing for and performing the jobs identified by Mr. Sanders under the medical restrictions given her by her physicians. The majority of the physicians' opinions, including her FCE results, support this conclusion, and even Claimant acknowledged she has worked since Employer, a fact shown by her testimony and her LS-200 (EX 48). Her post-injury employment includes such activities as secretarial work, store clerk, bus driver and babysitter.

Of the numerous physicians Claimant has seen, Drs. Winters, Millette², Lassiter and Yearwood all agree that Claimant can either do light restrictive or sedentary work. The FCE likewise confirmed this opinion, and in doing so considered all the complaints Claimant voiced in the treatment she had received, as did Mr. Sanders in identifying potential jobs for which Claimant only applied for two.

Consequently, since May 8, 2001, I find Employer through the use of Mr. Sanders' job surveys before and after this time has demonstrated numerous job opportunities which would afford Claimant no less than \$200.00 per week, and that I find to be her post-injury earning capacity.

ORDER

(1) For the periods of compensation previously paid to Claimant from March 11, 1999, until May 8, 2001, said payments shall be adjusted upward by using an average weekly wage of \$392.06 rather than the lower wage rate previously used to calculate her compensation entitlement;

(2) That commencing May 8, 2001 and continuing, Employer shall pay the Claimant permanent partial disability compensation based on an average weekly wage of \$392.06, but reduced by wage earning capacity of \$186.00 per week³;

(3) Employer shall continue to be responsible for all reasonable and necessary Section 7 medical expenses related to these claims;

(4) Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this Order at the rate provided by in 28 U.S.C. § 1961;

² On one occasion only Dr. Millette stated Claimant was unable to be gainfully employed; however, both before and after that occasion he consistently adopted Dr. Winters' opinion that Claimant was employable with restrictions or the guidelines of the FCE. Likewise, while opining on April 23, 2001, that Claimant was totally disabled, by May 8, 2001, Dr. Fleet released Claimant to return to work with only limitations of climbing, sweeping and mopping.

³ Mindful of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, Claimant's wages are adjusted to reflect their actual value at the time of Claimant's March 1999 injury. The National Average Weekly Wage (NAWW) for March 1999 was \$435.88, and the NAWW for May 2001 was \$466.91. Thus, the 1999 NAWW was approximately 93% of the 2001 NAWW. Therefore, the wages must be adjusted accordingly. Based on these adjustments, I find that Claimant has a residual wage earning capacity of \$186.00 per week.

(5) All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director; and

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

So ORDERED this 13th day of December, 2005, at Covington, Louisiana.

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C. RICHARD AVERY
Administrative Law Judge